

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
MRS. R. M. FANCHER
(PILOT WHEEL RANCH),

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY;
WILLIAM A. STRAIGHT; STEVEN
N. DREXLER and THOMAS L.
WALKER, JR.,

Respondents.

PCHB Nos. 983, 984 and 985

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THESE MATTERS, the consolidated appeals of the issuance of one ground water permit and the authorization for the issuance of two additional ground water permits having come to the Pollution Control Hearings Board, pursuant to stipulation by all parties in lieu of a formal hearing, and Appellant Mrs. R. M. Fancher appearing through her attorney, Kelly Hancock, and Respondent Department of Ecology appearing through its Assistant Attorney General Laura E. Eckert and Permittees

1 William A. Straight, Steven N. Drexler, and Thomas L. Walker, Jr.
2 appearing pro se, with Ellen D. Peterson, hearing examiner, presiding,
3 and the Board having considered the stipulated facts, exhibits and
4 written briefs and having reviewed the proposed Findings of Fact,
5 Conclusions of Law and Order of the presiding officer mailed to the
6 parties on the 11th day of October, 1976 by certified mail, return
7 receipt requested, and twenty days having elapsed from said service;
8 and

9 The Board having received no exceptions to said proposed Findings
10 of Fact, Conclusions of Law and Order, and the Board being fully
11 advised in the premises, now therefore,

12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
13 Findings of Fact, Conclusions of Law and Order dated the 11th day of
14 October, 1976, and incorporated by reference herein and attached
15 hereto as Exhibit A, is adopted and hereby entered as the Board's
16 Final Findings of Fact, Conclusions of Law and Order herein.

17 DONE at Lacey, Washington, this 5th day of November, 1976.

18 POLLUTION CONTROL HEARINGS BOARD

19 Art Brown
20 ART BROWN, Chairman

21 W. A. Gissberg
22 W. A. GISSBERG, Member

23 Chris Smith
24 CHRIS SMITH, Member

25
26
27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

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IN THE MATTER OF)
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PCHB Nos. 983, 984 and 985
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

These consolidated matters, appeals of the issuance of one ground water permit and the authorization for the issuance of two additional ground water permits, came to the Pollution Control Hearings Board, pursuant to stipulation by all parties, on stipulated facts and exhibits and written brief in lieu of a formal hearing.

Appellant Fancher (Pilot Wheel Ranch) was represented by Kelly Hancock; Assistant Attorney General Laura E. Eckert appeared for

EXHIBIT A

1 Respondent Department of Ecology; Permittees William A. Straight,
2 Steven N. Drexler, and Thomas L. Walker, Jr. were pro se throughout
3 the proceedings.

4 From pleadings filed, stipulated exhibits and facts examined,
5 and written briefs reviewed, the Hearing Examiner makes these

6 FINDINGS OF FACT

7 I

8 Appellant R. M. Fancher and family are owners of approximately
9 10,000 acres of pasture land in Okanogan County on which 2,000 head of
10 cattle are run. The Fanchers have vested water rights in Fanchers Dam,
11 Antoine Creek, and Whiskey Cache Creek. It is the water rights in the
12 latter which Mrs. Fancher feels will be impaired if the instant permit
13 and authorizations are sustained. One hundred acres, a grassy meadow, re
14 irrigated from the natural seepage of Whiskey Cache Creek. This meadow
15 is located immediately south of an old breached dam located at the
16 northern boundary of Section Nineteen (see Exhibit A-1). The creek
17 flow at the Fancher's north property line was no more than that
18 necessary for stock water during an observation made by the Department
19 of Ecology (DOE) on June 30, 1976.

20 II

21 The three permittees are contract purchasers of lots in "Okanogan
22 River Ranches," a development of some 200 lots, ranging in size from 5 to
23 40 acres, located north of the Fancher property and south of the
24 Okanogan National Forest (see Exhibit R-1). Only one other application
25 from this development, a surface water application noted on Exhibit

26 FINDINGS OF FACT,

27 CONCLUSIONS OF LAW AND ORDER

1 R-1 as "SWA-S 423601," is currently pending before DOE.

2 III

3 In PCHB No. 983, William A. Straight applied for a ground water
4 permit for the withdrawal of 10 gallons of water per minute, one acre-
5 foot a year for domestic and garden watering purposes. An Order authori-
6 zing the issuance of a permit for such amount for a continuous domestic
7 supply was issued on January 31, 1976. The permit itself has not been
8 issued.

9 The Straight property is Lot 1048 on Exhibit R-1 and is further
10 identified as "GWA-G423642." It was stipulated by all parties that the
11 terrain slopes westerly from the Straight lot towards Whiskey Cache
12 Creek, a distance of approximately 2/3 mile. The site is an arid upland
13 area approximately 100 feet higher than the creek channel. It was
14 estimated that the Straight lot was approximately 4-1/2 miles "as the
15 crow flies" from the Fancher Property. (See Exhibit R-2.)

16 Mr. Straight (PCHB No. 983) intends to dig his well at a depth
17 of 15 feet. It is the judgment of DOE that the permittee will
18 experience difficulty in obtaining a reliable domestic water supply
19 and will definitely not be able to obtain a firm water supply at the
20 anticipated 15 foot depth.

21 The conclusion that Mr. Straight's permit would have a minimal
22 impact on Appellant's water rights was based on DOE's finding that:

- 23 a. the daily potential demand would be 893 gallons,
24 b. 90 percent of this domestic water used would be returned
25 to the soil formations, and
26 c. the site is 3,500 feet from the creek.

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER 3

IV

In PCHB No. 984, Steven W. Drexler applied for a ground water permit on September 12, 1974 for 10 gallons per minute, two acre-feet a year for continuous domestic use. An Order authorizing the issuance of a permit for the requested amount and use limited to one acre-foot/year was issued on January 27, 1976. The permit itself has not been issued.

The Drexler property is Lot 133 on Exhibit R-1 which is further identified thereon as "GWA G423531."

It was the statement of the DOE that Mr. Drexler's successor in interest, Mr. William Newman, has already dug a dry hole at the approved point of withdrawal. Mr. Newman is reportedly constructing a new well on the creek bottom, a withdrawal site which is not authorized by the instant permit.

V

In PCHB No. 985, Thomas L. Walker, Jr. applied for a ground water permit on December 5, 1973 for the withdrawal of 30 gallons per minute for the irrigation of 12 acres for domestic supply, fire protection, irrigation and stock water. The request for irrigation use was denied but a permit did issue to Mr. Walker on February 24, 1976 for 10 gallons per minute up to one acre-foot a year for domestic supply and stock water continuously and fire protection as required.

The Walker property is Lot "h-11" on Exhibit R-1 and is further identified therein as "GWA G322218."

The waterway potentially impacted by the withdrawal of water from Mr. Walker's well would be Mosquito Creek rather than Whiskey Cache

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Creek as initially believed. Appellant has no rights in the waters
2 of Mosquito Creek.

3 VI

4 In each of the three cases, PCHB Nos. 983, 984 and 985, the
5 amount of water granted under the authorized or issued permit with the
6 limitation therein of one acre-foot/year is predictably less than that
7 amount of water which could be withdrawn without benefit of a permit
8 under RCW 90.44.050.¹

9 VII

10 In filing the instant appeals, Mrs. Fancher is attempting to
11 prevent (a) the granting of ground water permits to the development
12 lots, (b) the withdrawal of unauthorized amounts from the Creek, and
13 (c) the withdrawal of even those amounts now exempt under the statute
14 when the cumulative effect of such withdrawal would adversely impact
15 the Fancher water rights. A number of individuals and communes, many
16 of whom utilize the "bucket and cup well" method are currently with-
17 drawing water from Whiskey Cache Creek drainage basin.

18 The Pollution Control Hearings Board has no authority to review
19 or relieve Appellant's grievances with regard to (b) or (c).

20 VIII

21 WAC 173-549-050, adopted by DOE on July 14, 1976 provides:

22 STREAMS AND LAKES CLOSED TO FURTHER CONSUMPTIVE APPROPRIATIONS.
23 The department, having determined there are no waters available
24 for further appropriation through the establishment of rights
25 to use water consumptively, closes the following streams and
lakes to further consumptive appropriation for the periods
indicated, with exceptions as noted:

26 1. ". . . any withdrawal of public ground water for . . . single
27 or group domestic uses in an amount not exceeding five thousand
gallons a day . . . is and shall be exempt from the provisions of
this section"

Whiskey Cache Creek is therein listed as a stream which is to be "closed all year" as its stream is intermittent and has dry reaches even during the wetter seasons.

WAC 173-549-060 further provides:

GROUND WATER. If it is determined that a future development of ground water affects surface waters subject to the provisions of chapter 173-549 WAC, then rights to said ground water shall be subject to the same conditions as affected surface waters.

It is DOE's position that under these regulations it will determine the continuity (measurable cause and effect relationships) between the respective ground and surface water.

IX

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

I

The conclusion is reasserted that the Board has no authority to order members of the public to cease to withdraw waters exempt under the statute even if it could be established that the cumulative effect of such withdrawals is not in the public interest.

The Board's jurisdiction is limited under RCW 43.21B.110 to the review of appeals of final decisions or orders of the Department of Ecology.

II

Pursuant to RCW 90.44.060 (RCW 90.03.290) the DOE is required to make three findings based upon its investigations prior to issuance of a water use permit:

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

- 1 1. What water is available for appropriation for a beneficial use;
- 2 2. Will the appropriation impair existing rights, and
- 3 3. Will the appropriation be detrimental to the public welfare.

4 The Pollution Control Hearing Board's substantive review of the
5 validity of a ground water permit or its authorization is limited to a
6 consideration of these elements.

7 No challenge was raised in PCHB Nos. 983, 984, or 985 to the
8 DOE findings that water was available for appropriation for a
9 beneficial use or to the department's determination that the
10 appropriations would not be detrimental to the public welfare.

11 II

12 The facts are clear that with respect to Mr. Walker's permit
13 (PCHB No. 985) which would potentially impact on Mosquito rather
14 than Whiskey Cache Creek, no impairment to Appellant Fancher's
15 existing rights can be projected.

16 Equally apparent is the absence of any adverse impact on
17 Appellant's water rights from the dry well which has been dug at the
18 point of withdrawal authorized in PCHB No. 984 (Mr. Drexler/Newman).

19 On these facts, however, it is questionable on what basis the
20 DOE can ever issue a certificate of ground water right to Mr. Newman.

21 III

22 With respect to the permit authorization issued to Mr. William
23 Straight (PCHB No. 983), the facts regarding the impact of the
24 appropriation on Appellant Fancher's rights are not as self-evident.
25 However, the factors identified by DOE as the basis for its determi-
26 nation that no impairment would result were uncontroverted by Appellant.

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Appellant Fancher has failed to meet her burden of proving that
2 Mr. Straight's appropriation would impair her existing water rights.

3 IV

4 Any Finding of Fact which should be deemed a Conclusion of Law
5 is hereby adopted as such.

6 ORDER

7 The actions of the Department of Ecology authorizing the issuance
8 of ground water permits responsive to Application Nos. G4-23642, and
9 G4-23531, and issuing Ground Water Permit No. G3-22218P are affirmed.

10 DONE at Lacey, Washington this 1st day of October, 1976.

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12 ELLEN D. PETERSON, Presiding Officer

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FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER